Supreme Court, U.S.
FILED
MAR 27 2000
CLERK

No. 99-1246

IN THE
Supreme Court of the United States

DOLE FOOD COMPANY, INC.,
DOLE PACKAGED FOODS COMPANY,
AND DOLE THAILAND, LTD.,
Petitioners,

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF COMMERCE,
AND MAUI PINEAPPLE CO., LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION OF RESPONDENT MAUI PINEAPPLE CO., LTD.

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March 27, 2000

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QUESTIONS PRESENTED

1. Whether a reviewing court's approval of a particular cost allocation methodology in an antidumping case involving a pipe product constitutes "binding judicial precedent" controlling the selection of the cost allocation methodology in a subsequent case involving a pineapple product given (i) the statute's clear grant of discretion to the U.S. Commerce Department to choose how producers' costs are allocated, (ii) the factually complex nature of cost allocations in antidumping cases, (iii) the expertise of Commerce in selecting the appropriate methodology, and (iv) the clear distinction between pineapple and pipe products?

2. Whether the U.S. Commerce Department's finding that the production process and costs associated with pineapple production are sufficiently different from the production process and costs associated with the production of pipe so as to justify application of different cost allocation methodologies in each instance?

STATEMENT OF CORPORATE AFFILIATIONS

Maui Pineapple Co., Ltd. is a wholly owned subsidiary of Maui Land and Pineapple Co., Inc., a publicly traded company.

TABLE OF CONTENTS

Page(s)

STATEMENT OF THE CASE 1

A. Cost Allocations and the Underlying Administrative Determination 1

B. The Decision of the Appellate Court in *Thai Pineapple* 5

C. The *IPSCO* Decisions 7

REASONS FOR DENYING THE WRIT 8

I. THE FEDERAL CIRCUIT'S DECISION IS NOT SUFFICIENTLY IMPORTANT TO REQUIRE THE EXERCISE OF THIS COURT'S JURISDICTION 8

A. The Issue Raised By Petitioners Ultimately Is a Factual Question With Extremely Limited Implications for Other Litigants 9

B. This Court and Others Have Recognized Correctly That the Complex Factual Question At Issue in This Case Falls Squarely Within the Province of the Commerce Department and Its Special Reviewing Courts 10

TABLE OF CONTENTS (continued)

Page(s)

II. *IPSCO* DOES NOT CONSTITUTE "BINDING JUDICIAL PRECEDENT" THAT LIMITS COMMERCE'S CONSIDERATION OF A SIMILAR ISSUE INVOLVING DIFFERENT FACTS 13

A. The Federal Circuit's Distinction of *IPSCO* and the Present Case Was Not "Transparently Inadequate" 13

B. The Federal Circuit Did Not Ignore Principles of Stare Decisis and Disregard Binding Precedent Because the Facts of *IPSCO* and the Present Case Are Distinguishable 15

1. Dole Has Misconstrued the Meaning of Stare Decisis and Its Relevance to this Case 15

2. *Yellow Taxi* Is Not Controlling Given the Important Factual Differences Between *IPSCO* and the Present Case 17

TABLE OF CONTENTS (continued)

Page(s)

III. IN ANY EVENT, THE APPELLATE COURT CORRECTLY CONCLUDED THAT COMMERCE'S DECISION WAS BASED ON SUBSTANTIAL EVIDENCE 19

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Page(s)

Addionizio v. United States,
573 F.2d 147 (3d Cir. 1978) 16

Addionizio v. United States,
442 U.S. 178 (1979) 16

Allegheny Gen. Hosp. v. NLRB,
608 F.2d 965 (3d Cir. 1979) 16

Chevron, U.S.A., Inc. v. Natural Resources Defense Council,
467 U.S. 837 (1984) 10, 12

Chowdhury v. Reading Hosp. & Med. Ctr.,
677 F.2d 317 (3d Cir. 1982) 16

Chowdhury v. Reading Hosp. & Med. Ctr.,
463 U.S. 1229 (1983) 16

Daewoo Elec. Co. v. United States,
6 F.3d 1511 (Fed. Cir. 1993) 11

Daewoo Elec. Co. v. United States,
512 U.S. 1204 (1994) 11

Downs v. United States,
187 U.S. 496 (1903) 9

FPC v. Florida Power & Light Co.,
404 U.S. 453 (1972) 11

TABLE OF AUTHORITIES (continued)

Page(s)

Fujitsu General Ltd. v. United States,
88 F.3d 1034 (Fed. Cir. 1996) 11

Hercules, Inc. v. United States,
673 F. Supp. 454 (Ct. Int'l Trade 1987) 2

Institute for Scientific Info., Inc. v. United States Postal Service,
555 F.2d 128 (3d Cir. 1977) 16

IPSCO, Inc. v. United States,
687 F. Supp. 633 (CT. Int'l Trade 1988) 7

IPSO, Inc. v. United States,
714 F. Supp. 1211 (Ct. Int'l Trade 1989) 7

IPSCO, Inc. v. United States,
965 F.2d 1056 (Fed. Cir. 1992) ..... Passim

Kleppe v. Sierra Club,
427 U.S. 390 (1976) 12

Local 777, Democratic Union Organization Committee, Seafarers International Union of North America v. NLRB,
603 F.2d 862 (D.C. Cir. 1978) 18

Marsh, Secretary of the Army, et al. v. Oregon Natural Resources Council et al.,
490 U.S. 360 (1989) 12

TABLE OF AUTHORITIES (continued)

Page(s)

Micron Technology, Inc. v. United States,
117 F.3d 1386 (Fed. Cir. 1997) 20

PPG Indus. v. United States,
978 F.2d 1232 (Fed. Cir. 1992) 19

Thai Pineapple Co., Ltd. v. United States,
187 F.3d 1362 (Fed. Cir. 1999) ..... Passim

Thai Pineapple Public Co., Ltd. v. United States,
946 F. Supp. 11 (Ct. Int'l Trade 1996) 1, 2

Unites States v. Haggar Apparel Co.,
143 L. Ed. 2d 480 (1993) 12

United States v. Johnson,
268 U.S. 220 (1925) 10

Yellow Taxi Co. of Minneapolis v. NLRB,
721 F.2d 366 (D.C. Cir. 1983) 17

Zenith Radio Corp. v. United States,
437 U.S. 443 (1978) 10

STATUTES

19 U.S.C. § 1673 9

19 U.S.C. § 1516 a (b) (1) (B) (i) 20

H.R. Rep. No. 571, 93d Cong., 1st Sess. 71 (1993) 2

MISCELLANEOUS

Page(s)

Final Determination of Sales at Less Than Fair Value; Canned Pineapple Fruit from Thailand, 60 Fed. Reg. 29,553 (June 5, 1995) 1, 4

Final Determination of Sales at Less Than Fair Value; Canned Pineapple Fruit from Thailand, 60 Fed. Reg. 36,775 (July 18, 1995) 1

Oil Country Tubular Goods from Canada, 51 Fed. Reg. 21,782 (June 19, 1986) 7

Oil Country Tubular Goods from Canada, 51 Fed. Reg. 21,579 (Aug. 19, 1986) 7

White, Supreme Court Review of Agency Decisions, 26 Admin. L. Rev. 107 (1974) 21

STATEMENT OF THE CASE

Dole Food Company, Inc., Dole Packaged Foods Company, and Dole Thailand, Ltd. (collectively, "Dole" or "Petitioners") have petitioned this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit ("appellate court" or "Federal Circuit") in Thai Pineapple Public Co., Ltd. v. United States, 187 F.3d 1362 (Fed. Cir. 1999) ("Thai Pineapple II"). Respondent, Maui Pineapple Co., Ltd. ("Maui"), opposes this petition. As set forth below, Dole's petition lacks merit because it (1) raises a factual issue that is of limited importance in the overall scheme of the law, (2) mischaracterizes as "binding precedent" a case that is clearly distinguishable on its facts, and (3) challenges a decision of the U.S. Department of Commerce ("Commerce") that the Federal Circuit correctly found to be based on substantial evidence. Dole's petition therefore should be rejected.

A. Cost Allocations and the Underlying Administrative Determination

This case has its genesis in an antidumping petition filed by Respondent Maui, the only U.S. producer of canned pineapple. In 1994, Maui petitioned Commerce to investigate whether various producers of canned pineapple from Thailand were selling pineapple in the United States at "less than fair value," an action that merits the imposition of offsetting tariffs under U.S. antidumping duty law. Commerce ultimately found that the Thai producers, including Dole, were selling pineapple into the United States at "dumped" prices, using Thai producers' production costs as the benchmark for measuring dumping. See Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit From Thailand, 60 Fed. Reg. 29,553 (June 5, 1995), ("Thai Pineapple"), as amended, 60 Fed. Reg. 36,775 (July 18, 1995) (Pet. App. at 57a-101a).

The measurement of Dole's production costs was an important and complex element of Commerce's dumping calculation. While the antidumping statute does not specify the precise methodology that Commerce must use to calculate cost of production, Congress has instructed Commerce to "employ accounting principles generally accepted in the home market country of exportation." H.R. Rep. No. 571, 93d Cong., 1st Sess. 71 (1993). Thus, Commerce normally bases its cost allocations on standard accounting principles as reflected in a company's books and records when the record establishes that the company's accounting practices reflect the actual costs incurred in producing the merchandise. This fact-based approach to analyzing a company's production costs for antidumping purposes has been affirmed repeatedly by reviewing courts. See, e.g., Hercules, Inc. v. United States, 673 F. Supp. 454, 491 (Ct. Int'l Trade 1987) (upholding reliance on a company's normal books and records "in the absence of substantiating evidence that this methodology was a deviation or misrepresentation of {the company's} costs").

Notwithstanding, the statute provides Commerce with discretion to adjust or modify its cost allocation methodology on a case-by-case basis to account for the facts of each case. Thus, it is not true, as Dole claims, that there are only "two possible approaches" to the allocation of production costs. Petition at 2. Rather, this is a methodological determination that is left to the discretion of the agency based on the particular facts at issue. The lower court decision upon which Dole relies, Thai Pineapple Public Co., Ltd. v. United States, 946 F. Supp. 11 (Ct. Int'l Trade 1996), ("Thai Pineapple I"), effectively recognized this point by instructing Commerce to employ a "non-output price-based" cost allocation methodology (Pet. App. at 55a), thus leaving the precise methodology for measuring costs to the discretion of the agency.

Commerce's calculation of production costs in this case was particularly complicated given that Dole and the remaining Thai companies produced both pineapple, the focus of the agency's investigation, as well as pineapple juice and juice concentrate, which were outside the scope of the investigation. All of these products are produced using separate parts of the same raw material, fresh pineapple fruit. As a result, they share joint raw material costs. Because of this overlap in production costs, in calculating the Thai producers' cost of production, Commerce had to allocate a portion of the shared costs between canned pineapple and its "co-products," pineapple juice and juice concentrate.

The debate surrounding the proper methodology for allocating costs between canned pineapple and other pineapple products concerned whether to base the allocation on the weight of the parts of the fruit used to produce the pineapple products or their value. Because the parts of the pineapple used to produce canned pineapple fruit weigh less than the parts of the pineapple used to produce other pineapple products, namely juice, production costs for canned pineapple fruit under a weight-based methodology are lower, leading in turn, to lower allocated production costs and lower antidumping margins. While Dole admits that canned pineapple and pineapple juice "each has commercial significance in its own right," (Petition at 2) -- and thus implicitly endorses a value-based methodology -- it nonetheless argues that Commerce should have based its cost allocations on weight. Id. at 3.

Having examined the facts carefully, and consistent with its practice, Commerce ultimately determined to allocate pineapple fruit costs using the methodology reflected in the Thai producers' books and records. Commerce explained its decision as follows:

> the Department {Commerce} examined whether each respondent's normal fruit cost allocation methodology was reasonable. In examining each respondent's books and records at verification we found that each company had used its recorded fruit cost allocation methodology for at least a number of years. Furthermore, we found no evidence that each respondent had not relied historically upon its recorded allocation percentages to compute its production costs. In addition, evidence on the record, i.e., audited financial statements, indicates that each respondent's normal allocation methodology was accepted by its independent auditors. Given the auditors' acceptance of the respondents' financial statements and any lack of evidence to the contrary, we conclude that each respondent's normal allocation methodology is consistent with generally accepted accounting principles practiced in Thailand.

Thai Pineapple, 60 Fed. Reg. at 29,559 (Pet. App. at 83a).

Commerce also carefully considered the alternative weight-based methodology offered by the Thai producers. In so doing, it stated that

> allocating the cost of pineapple evenly over weight is not supportable. Using weight alone as the allocation criteria sets up the illogical supposition that a load of shells, cores and ends cost just as much as an equal weight of trimmed and cored pineapple cylinders.

Id. at 29,560. In other words, Commerce concluded that allocating pineapple fruit costs solely on the basis of weight failed to account for the qualitative difference and revenue-generating power of the various parts of the pineapple. Thus, for three Thai producers, Commerce allocated fruit costs according to their normal books and records, which were historically used and approved by independent auditors, based on Thai accounting principles, and adjusted periodically for accuracy. With respect to Dole, because Commerce found (and Dole conceded) that the allocation methodology reflected in its normal books and records was distortive, Commerce allocated Dole's costs based upon the average of the fruit cost allocation percentages used by the other three respondents in their normal accounting systems. Id.

B. The Decision of the Appellate Court in *Thai Pineapple*

On appeal in Thai Pineapple II, the Federal Circuit affirmed the methodology used by the agency in allocating Dole's fruit costs. It did so because it concluded that "Commerce's interpretation was reasonable, supported by substantial evidence, and thus entitled to deference." Pet. App. at 14a. It further found that the lower court had erred by "reject{ing} a reasonable allocation methodology which Commerce determined recognized the use and value of the raw material." Pet. App. at 13a.

In reaching this determination, the Court noted, inter alia, that Commerce found the books and records of the Thai producers

> to be reasonably reflective of their costs because their normal allocation methodologies were used for a number of years, accepted by independent auditors and historically relied

> upon to present important financial information to shareholders, lenders, tax authorities, auditors, and other third parties.

Pet. App. at 8a. In addition to citing the factual bases in support of the agency's conclusion, the Court further recognized that "{a}ntidumping investigations are complex and complicated matters in which Commerce has particular expertise and thus, Commerce's determinations are entitled to deference." Pet. App. at 9a.

Importantly, the court agreed that its earlier decision in IPSCO, Inc. v. United States, 965 F.2d 1056 (Fed. Cir. 1992) ("IPSCO III"), did not control the methodology chosen by Commerce in Thai Pineapple. Pet. App. at 11a. Rather, after examining the relevant facts concerning the production and cost of producing the pipe products at issue in IPSCO, (Pet. App. at 12a-13a), the Federal Circuit concluded that "{u}nder the facts of that case, Commerce's use of a weight based allocation methodology was a reasonable interpretation of the statute." Pet. App. at 13a (emphasis added). In contrast, the court noted that "pineapple fruit is not a homogenous raw material like the raw material used to make the pipe in IPSCO III, and the production process is entirely different for the various pineapple products produced." Id. Given these clear differences, the court held that "under the facts of this case, we conclude that the Court of International Trade improperly held that IPSCO III was controlling precedent." Id. (emphasis added). The Federal Circuit thus carefully distinguished its own precedent in finding that the facts in Thai Pineapple justified a different outcome from IPSCO III -- a task it was uniquely positioned to perform.

C. The *IPSCO* Decisions

Dole's Petition revolves around an alleged rule articulated by the Federal Circuit in IPSCO III on "how to approach the question of apportioning input costs of co-products." Petition at 10. According to Dole, in IPSCO III, the court "ruled that there is one way and one way only of allocating input costs as between co-products, and that is on the basis of their inherent characteristics such as weight." Id. Dole's recitation of the IPSCO III "rule," however, omits important aspects of the decision.

The IPSCO line of cases involved an appeal from an affirmative antidumping duty determination issued by Commerce in Oil Country Tubular Goods ("OCTG") from Canada, 51 Fed. Reg. 21,782 (June 19, 1986), as amended, 51 Fed. Reg. 29,579 (Aug. 19, 1986). The merchandise under investigation in that case was steel pipe for oil and gas wells produced in "prime" and "limited service" (or "off-spec") grades. Unlike the situation with pineapples, the two products were sold for the same uses and were produced using the exact same manufacturing process, but differed in their ultimate market price due to the differing quality of the merchandise.

In assigning costs to the merchandise in OCTG, Commerce allocated costs equally between prime and off-spec pipe because the products were produced simultaneously. IPSCO appealed Commerce's allocation methodology, claiming that the agency should have allocated costs by treating off-spec pipe as a by-product. See IPSCO, Inc. v. United States, 687 F. Supp. 633 (Ct. Int'l Trade 1988). On remand, Commerce explained the reasons for its allocation, including its concern that IPSCO itself allocated costs on a co-product basis in its financial statements, which were based on generally accepted accounting principles. See IPSCO, Inc. v. United States, 714 F. Supp. 1211, 1213 (Ct. Int'l Trade 1989). The lower court,

however, rejected Commerce's approach and directed the agency to revise its methodology by allocating costs between prime and off-spec pipe based on their proportionate market value.

On appeal in IPSCO III, the Federal Circuit reversed. The appellate court overturned the lower court on the ground that it had wrongly substituted its own construction of the statute for that of the agency. The court explained, inter alia, that "{Commerce's} original methodology for calculating constructed value was a consistent and reasonable interpretation of {the statute}," which requires "consideration of actual production costs." 965 F.2d at 1061, 1059. While the Federal Circuit expressed concern regarding the potential circularity that could result by allocating costs using the value-based methodology ordered by the lower court, it merely concluded, in dicta, that the statute establishes cost of production as an independent standard for fair value. Id. at 1061. Thus, IPSCO III does not create an absolute rule precluding Commerce from allocating costs on the basis of value, as Dole claims; rather, the only rule articulated in IPSCO III is that a court may not substitute its judgment for that of an agency when the agency's approach under the facts at issue constitutes a reasonable interpretation of the statute.

REASONS FOR DENYING THE WRIT

I. THE FEDERAL CIRCUIT'S DECISION IS NOT SUFFICIENTLY IMPORTANT TO REQUIRE THE EXERCISE OF THIS COURT'S JURISDICTION

This case is not one that requires the exercise of this Court's extraordinary and discretionary jurisdiction. Contrary to Dole's claims, there is no important principle of administrative law at issue here; rather, the issue presented

concerns an obscure aspect of antidumping duty law that turns on application of an agency's technical expertise to a highly complex set of facts. Under these circumstances, this Court should not expend its valuable resources attempting to resolve a dispute with such limited implications for future litigants in antidumping lawsuits.

A. The Issue Raised By Petitioners Is a Factual Question With Extremely Limited Implications for Other Litigants

The issue in this case -- how the costs of producing canned pineapple should be allocated among shared raw materials for purposes of calculating the "cost of production" in an antidumping duty case -- is of minor importance in the area of administrative law generally, and even in the specific context of antidumping duty law. It is unlikely to recur and is too narrow to warrant review by this Court on certiorari. Indeed, even Dole concedes that "the specific point of trade law that is the subject matter of this case is somewhat obscure . . . ." Dole Petition at 2. Dole also implicitly admits that its Petition is motivated more by financial concerns than by jurisprudential ones. Id. at 3.

The issue can arise only in antidumping cases being conducted by the Department of Commerce under 19 U.S.C. § 1673. Moreover, the issue does not in any sense broadly concern the administration of the antidumping duty statute by Commerce.[1/] It involves only the aspect of the statute that is relevant when Commerce calculates cost of production, and

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1/ Compare Downs v. United States, 187 U.S. 496 (1903) (where this Court examined the scope of export activities against which a bounty could be imposed under the countervailing duty law).

even then, is limited to the highly unusual situation where the agency is required to allocate costs among "co-products."

Moreover, the only real question at issue is a factual one, that is, whether, given the peculiarities of pineapple processing, the agency properly allocated costs of production between pineapple "meat" and pineapple juice based on the value of these products. This Court has ruled, however, that such factual analysis does not trigger a grant of certiorari. See, e.g., United States v. Johnson, 268 U.S. 220, 227 (1925). Further, in the realm of factual review and analysis, it is well established that the determinations of administrative agencies are treated with, and entitled to, great weight. See Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 844 (1984). In the present case, Dole raises only questions turning entirely on the facts, and with little, if any impact, outside the limits of this case. For this reason alone, certiorari should be denied.

B. This Court and Others Have Recognized Correctly That the Complex Factual Question At Issue in This Case Falls Squarely Within the Province of the Commerce Department and Its Special Reviewing Courts

Recognizing the highly factual nature of antidumping investigations and the complex calculation of costs that such investigations sometimes require, the question at issue in this Petition has been circumscribed to the province of the Commerce Department.[2/] As the appellate court has stated,

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2/ That the antidumping law involves a complex web of factual determinations is reflected in the very limited number of instances in which this Court has taken up cases in this area of the law. In fact, the last time

(continued...)

Commerce is the "master of antidumping law." See Daewoo Elec. Co. v. International Union, 6 F.3d 1511, 1516 (Fed. Cir. 1993), cert. denied, 512 U.S. 1204 (1994). In turn, the court "accords deference to the determinations of the agency that turn on complex economic and accounting inquiries," and the methodologies relied on by Commerce in making its determinations are presumptively correct. Fujitsu General Ltd. v. United States, 88 F.3d 1034, 1044 (Fed. Cir. 1996). This Court, too, has routinely embraced this notion. See, e.g., FPC v. Florida Power & Light Co., 404 U.S. 453, 463 (1972) ("Particularly when we consider a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on 'engineering and scientific' considerations, we recognize the relevant agency's technical expertise and experience . . . .").

The concessions made by Dole on this point are telling once again. Indeed, Dole acknowledges that "antidumping law and the determinations required for its application have the requisite complexity for the Commerce Department to be considered its 'master' " and that "the courts are and should be loathe to second-guess the Department, with all of the material and technical resources available to it, when it does what it does best." Petition at 13. What Dole fails to realize, however, is that the very issue addressed by the appellate court that it

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(...continued)

this Court granted certiorari on a case involving U.S. international trade laws was in 1978. See Zenith Radio Corp. v. United States, 437 U.S. 443 (1978). While Zenith Radio was concerned broadly with the proper interpretation of the countervailing duty law, this case, in contrast, concerns a narrow and purely methodological issue affecting the calculation of antidumping duties that turns on the analysis of complex facts. As such, this is not a case that should compel the Court to re-familiarize itself with the morass of laws governing unfair practices in international trade.

now challenges -- the allocation and calculation of production costs -- is exactly the type of complex factual question that virtually every court of judicial review has left to the expertise of the agency. See, e.g., Marsh, Secretary of the Army, et al. v. Oregon Natural Resources Council, et al., 490 U.S. 360, 376-77 (1989) (rejecting argument that issue reviewed is of a legal nature because analysis of relevant documents 'requires a high level of technical expertise,' in turn requiring Court to defer to 'the informed discretion of the responsible federal agencies.' " (quoting Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)).

This Court, in turn, has recognized the "expertise of the Court of International Trade . . . in making complex determinations in a specialized area of the law . . . ." United States v. Haggar Apparel Co., 143 L. Ed. 2d 480, __ U.S. __, 119 S. Ct. 1392, 1400 (1999). While Dole relies on Haggar for the proposition that the CIT's contrary view of the facts regarding pineapple cost allocations somehow trumps the decision of the appellate court, it misses the significance of that court's specialized jurisdiction, and, in turn, the specialized jurisdiction of the appellate court.[3/] That is, issues pertaining to the allocation of production costs in antidumping cases are best left to the expertise of these courts, and, as discussed infra in section II.B.1., it is these courts that are best able to distinguish their own precedent. Dole also overlooks the important point that the differing outcomes in the lower and appellate court cases resulted from the lower court's failure to accord proper deference to the agency under the Chevron doctrine, (see Pet. App. at 13a), a principle that guided the appellate court in its consideration of the pineapple cost allocation issue and further underscores the factually intensive and complex nature of this issue.

3/ At the same time, however, Dole acknowledges that the appellate court is a specialized court charged with overseeing the operations of the Commerce Department. Petition at 16.

II. *IPSCO* DOES NOT CONSTITUTE "BINDING JUDICIAL PRECEDENT" THAT LIMITS COMMERCE'S CONSIDERATION OF A SIMILAR ISSUE INVOLVING DIFFERENT FACTS

Perhaps recognizing that the underlying issue in this case turns on the resolution of a factual question by Commerce, Dole attempts to characterize Commerce's action as a failure to adhere to allegedly "binding judicial precedent" governing cost allocation methodologies established by the Federal Circuit in IPSCO III. See, e.g., Petition at 16. Dole's contention that IPSCO III creates a binding rule governing cost allocation methodologies and that the Federal Circuit must abide by that rule to comply with the principle of stare decisis is without merit. Here, the Federal Circuit could not apply the rule in IPSCO III because the facts at issue in the present case were readily distinguishable from the facts in IPSCO III. The appellate court, therefore, properly upheld Commerce's decision that the unique production process of canned pineapple fruit and juice justified application of a different cost allocation methodology than the methodology applied to allocate costs incurred in producing prime and limited service pipe. Commerce thus did not contradict "binding judicial precedent" when it allocated pineapple costs using a different methodology than the methodology adopted in IPSCO III.

A. The Federal Circuit's Distinction of *IPSCO* and the Present Case Was Not "Transparently Inadequate"

As a threshold matter, Dole argues, as it must, that the case at bar squares with IPSCO III and that the Federal Circuit has "transparently" distinguished the two cases by noting simply that steel pipes and pineapples are different items. Petition at 14-15. This is a glib assessment of the analysis of

complex production processes and accounting methods undertaken by Commerce and upheld by the appellate court.

In IPSCO III, the Federal Circuit held that weight represented an appropriate method for allocating the costs of inputs used to produce prime and off-spec pipe given record evidence showing that pipe producers "expend the same materials, capital, labor, and overhead for both grades of OCTG." IPSCO III, 965 F.2d at 1060. Only when the final products are inspected at the end of the production process can the value of the pipes be assessed.

In contrast, canned pineapple fruit and pineapple juice are made with different inputs of differing values. Canned pineapple fruit is generally made with the more expensive cored cylinders of pineapples. Because the parts of the pineapple have different uses and values, they are not interchangeable. Pet. App. at 12a. Pineapple juice is made from the leftover fruit that can be eradicated from the peel of the pineapples after the core is removed and from the inferior quality cuts of the pineapple. It is because these input values differ, and because the Thai pineapple producers' books and records recorded this difference, that Commerce and the Federal Circuit determined that allocating 80 percent of the fruit cost to canned pineapple and 20 percent to pineapple juice was an accurate assessment of the costs of production of the two co-products. Pet. App. at 8a.

Finally, the Federal Circuit addressed the very circularity concern of the court in IPSCO III, that is, whether, under the agency's methodology, the selling price (or value) of pineapple became the yardstick for measuring the selling price of pineapple, and concluded that this concern was not implicated by the methodology selected by Commerce. Pet. App. at 13a. The appellate court noted specifically, that Commerce's allocation of the cost of raw pineapple fruit

between canned pineapple fruit and other products was not based on the selling price of these products, but on the foreign producers' own books and records. See id.

Given this sophisticated consideration of two differing and complex sets of facts undertaken by the agency and both reviewing courts, Dole's argument that IPSCO III and the present case "cannot be meaningfully distinguished" is wrong. Rather than simply noting that pipe and pineapple are different products, the appellate court examined the nature and cost of the inputs for these products, their production process, and the manner in which the Thai producers' financial systems accounted for these factors. This analysis constituted a more than adequate distinction of IPSCO and the present case.

B. The Federal Circuit Did Not Ignore Principles of Stare Decisis and Disregard Binding Precedent Because the Facts of *IPSCO* and the Present Case Are Distinguishable

1. Dole Has Misconstrued the Meaning of Stare Decisis and Its Relevance to this Case

Invoking the mantra of stare decisis, Dole claims that, "{a}t its core, this case concerns whether the Department of Commerce is obligated to follow IPSCO . . . ." Petition at 16. Dole, however, fails to recognize that principles of stare decisis do not apply when a case is distinguishable on its facts. Moreover, the Federal Circuit, as the Court that decided IPSCO III, is in the best position to determine the precedential effect of IPSCO III vis-a-vis the new and different set of facts presented by Thai Pineapple.

Specifically, because of the clear distinctions between IPSCO and Thai Pineapple II, the limit of judicial deference to agency action that contradicts binding judicial precedent is not at issue in this case. Rather, as set forth supra, in Thai Pineapple II, the Federal Circuit upheld the agency's methodology because Commerce properly distinguished the facts it was reviewing from those at issue in IPSCO. Pet. App. at 13a. Thus, while the Federal Circuit's decision differs from IPSCO III, it is not inconsistent with it and certainly does not overrule it.

The principle of stare decisis and the judicial practice of distinguishing cases involving similar issues on the basis of differing facts are not mutually exclusive and both are essential to the proper functioning of the judicial system. The essence of the common law doctrine of precedent or stare decisis is that the rule of the case creates a binding legal precept but only as to similar facts. As explained by one court, "A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy." Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317 (3d Cir. 1982), cert. denied, 463 U.S. 1229 (1983) (quoting Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969-70 (3d Cir. 1979) (emphasis added)); see also Addonizio v. United States, 573 F.2d 147, 151 (3d Cir. 1978), rev'd on other grounds, 442 U.S. 178, 99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979); Institute for Scientific Info., Inc. v. United States Postal Serv., 555 F.2d 128, 130 (3d Cir. 1977)). Thus, the notion of "precedent," or stare decisis, is only controlling insofar as facts across cases are similar. Given the distinctly different factual underpinnings of IPSCO III and the present case, Dole has thus

misconstrued the relevance of the stare decisis principle to this case.

In this regard, Dole wrongly faults Commerce for citing no other cases that allocate costs on the basis of value. Petition at 18. Indeed, the reason that Commerce cites no other cases that applied a value-based methodology is that the facts presented in the present case are unique, which is the very reason that the agency, within its discretion to examine the facts and select appropriate methodologies, chose to allocate costs on the basis of the value formulas reflected in the Thai producers' books and records rather than the alternative weight-based methodology found to be appropriate under the facts of IPSCO III. In fact, it is entirely possible that Commerce may never again apply the methodology upheld in Thai Pineapple II if a comparable factual scenario justifying application of that methodology does not arise. Thus, contrary to Dole's claims, there was no need for the appellate court to "overrule" IPSCO III, and the court thus did not "abdicate its role in upholding principles of stare decisis." Petition at 19. Rather, the court simply concluded, as it was well-positioned to do, that its own precedent was not controlling.

2. *Yellow Taxi* Is Not Controlling Given the Important Factual Differences Between *IPSCO* and the Present Case

Just as Dole wrongly invokes the concept of stare decisis, its reliance on Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 372 (D.C. Cir. 1983), for the proposition that agencies must conform to judicial precedent also is misplaced. As set forth supra, while this proposition is indisputable to the extent that a case is not appropriately distinguishable, if the facts of a case differ from the facts of otherwise binding precedent, then a court, through its essential function of applying law to facts, must distinguish the two

cases and revise the rule. The case at bar is such a case, making Yellow Taxi inapplicable.

In the administrative decision at issue in Yellow Taxi, the NLRB found that taxi cab driver/lessees were "employees" of a cab company/leasor for purposes of the National Labor Relations Act ("NLRA"). In an earlier case, the D.C. Circuit ruled that cab driver/lessees operating under a nearly identical lease to the one at issue in Yellow Taxi were not employees for purposes of the NLRA. See Local 777, Democratic Union Organizing Committee, Seafarers International Union of North America v. NLRB, 603 F.2d 862 (D.C. Cir. 1978) ("Seafarers").

Because the leases at issue in Yellow Taxi and Seafarers were virtually identical and the facts were not materially distinguishable, the D.C. Circuit, reviewing the administrative decision at issue in Yellow Taxi, held that the NLRB must respect the applicable decisions of the court. Yellow Taxi at 382. While the court in Yellow Taxi said that "a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect," at the same time, the court recognized that the two cases were indistinguishable and overruled the NLRB because the leases in both cases, analyzed under the NLRA, indicated that the cab drivers were not "employees" as defined by the NLRA.

Comparing leases to determine whether each establishes the same relationship between the leasor and the lessees requires a far less rigorous factual analysis than comparing multi-step production processes for radically different products and the various cost allocation accounting methods that can be used to measure costs of production. While Dole states that Yellow Taxi and the present case are "analytically identical" (Petition at 17), it misses the important point that the facts at

issue in Yellow Taxi and Seafarers were simple -- virtually identical leases establishing virtually identical relationships between cab companies and cab drivers -- while the facts at issue in IPSCO and Thai Pineapple are complex -- how to allocate costs involved in the complex production processes of pipe and pineapple.

In short, Commerce employed a reasonable allocation methodology designed to accurately account for differing values, and, hence, different production costs among pineapple co-products. If a weight-based methodology advocated by IPSCO were used, it would accord the same input value to more expensive cored cylinders of pineapple fruit as it would to the less expensive juice co-product. The Federal Circuit realized the potential error in this outcome, and, deferring to Commerce's expertise, affirmed the agency's position that allocating costs for the production of canned pineapple fruit and pineapple juice was a sufficiently unique exercise to justify a different approach from the allocation methodology adopted in IPSCO III.

III. IN ANY EVENT, THE APPELLATE COURT CORRECTLY CONCLUDED THAT COMMERCE'S DECISION WAS BASED ON SUBSTANTIAL EVIDENCE

The distinctions between Thai Pineapple and IPSCO aside, Dole's petition does not warrant exercise of this Court's jurisdiction because the appellate court properly applied the governing standard applicable to review of Commerce determinations. See PPG Indus. v. United States, 978 F.2d 1232, 1236 (Fed. Cir. 1992) (Federal Circuit, in reviewing Court of International Trade decisions, applies the same substantial evidence standard applied by the Court of International Trade). Applying this standard, the Federal Circuit was bound to uphold Commerce's determination unless

it was "unsupported by substantial evidence on the record, or otherwise not in accordance with law." Micron Technology, Inc. v. United States, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)).

The Federal Circuit thrice stated that Commerce's chosen cost allocation methodology as to both Dole and the remaining Thai producers was "reasonable and supported by substantial evidence." Pet. App. at 10a, 11a, 14a. In so doing, it cited evidence pertaining to the consistency of the allocation methodologies used by the Thai producers in their normal books and records, (Pet. App. at 8a, 9a, 10a, 14a), the accuracy of these methodologies as "reasonably reflective" of production costs and the companies' actual production experience, (Pet. App. at 8a),[4/] the historical reliance on these methodologies by Thai producers, (Pet. App. at 8a, 9a, 14a) and the absence on the record of any examples of companies that relied on a different methodology (Pet. App. at 8a). Further, the court noted that

> the description of the production process provided to Commerce by {certain Thai producers} reflects a distinction in the quality and portions of pineapple fruit used to produce canned pineapple fruit and juice that is consistent with the normal allocation in their books and records.

Pet. App. at 8a. The appellate court thus was able to tie the agency's chosen methodology to the Thai producers' own

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4/ With respect to Dole, in particular, the appellate court recognized that Dole occasionally purchased smaller pineapples for use in producing juice products, thus according some measure of value for the portion of the raw pineapple fruit used to make juice. Pet. App. at 10a.

processes and explanations about how canned pineapple was produced and how production costs were recorded.

Given these factual findings made by the agency, Commerce's cost allocation methodology was reasonable and supported by substantial evidence. The Federal Circuit, in turn, correctly reversed the Court of International Trade because that court "rejected a reasonable allocation methodology which Commerce determined recognized the use and value of the raw material." Pet. App. at 13a. Because the result reached by the appellate court was based on substantial evidence, certiorari is not warranted in this case.[5/]

CONCLUSION

For all of the foregoing reasons, respondent Maui respectfully requests that this Court deny Petitioners' request for a Writ of Certiorari and that this matter be remanded to the lower court on the issue of attorney's fee for findings consistent with the ruling of the Court of Appeals for the Federal Circuit.

5/ See White, Supreme Court Review of Agency Decisions, 26 Admin. L. Rev. 107, 110 (1974) (noting "the prevailing rule, peculiar to Supreme Court litigation, that once a Court of Appeals has found an agency fact judgment supported by substantial evidence, the case does not merit further review and the appellate function is at an end.").

Respectfully submitted,

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Dated: March 27, 2000